

No. 76-897

Supreme Court, U. S.  
**FILED**

**MAR 4 1977**

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

**SIDNEY J. HESS, JR., ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

**DANIEL M. FRIEDMAN,**  
*Acting Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

*In the Supreme Court of the United States*

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Petitioners challenge the decision of the Court of Claims that their bases for federal income tax purposes in certain shares of stock acquired from two estates were equal to the fair market value of the stock as determined for estate tax purposes.

The pertinent facts are as follows: Petitioners are trustees of testamentary trusts established under the will of Barney Ets Hokin and beneficiaries of a testamentary trust established under the will of Loraine Ets Hokin (Pet. App. A1-A2). The estate of Barney Ets Hokin and the Loraine Ets Hokin trust owned shares in International Nikoh Corporation (Pet. App. A2-A3). These shares had been valued by the decedents' representatives for federal



estate tax purposes at \$98 and \$200 per share<sup>1</sup> as of the dates of the decedents' respective deaths and the Internal Revenue Service accepted these values (Pet. App. A12). On February 5, 1965, the Nikoh shares were redeemed at a price of \$367 per share (Pet. App. A3).

On their 1965 income tax returns, the estate and trust reported a long-term capital gain based on the difference between the \$367 per share redemption price and the \$98 and \$200 per share values used for estate tax purposes (Pet. App. A4). On November 12, 1968, after the statute of limitations for making adjustment to the values of the stock on the estate tax returns had expired, petitioners filed refund claims asserting that their bases in the Nikoh stock were \$367 per share and that they had recognized no gain upon the redemption (Pet. App. A5-A6). In this refund suit, the Court of Claims rejected petitioners' claim. It held that petitioners could not take the position that their bases in the stock for income tax purposes exceeded the values accepted for estate tax purposes (Pet. App. A1-A14).

Section 1014(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that the basis in property acquired from a decedent "shall \* \* \* be the fair market value of the property" at the valuation date for estate tax purposes. Section 2031 of the Code in turn provides that a decedent's gross estate includes the fair market value of all property in which the decedent had an interest. Accordingly, the fair market value determined for estate tax purposes will generally be the basis of the property in the hands of the

<sup>1</sup>The estate of Loraine Ets Hokin originally valued the stock at \$128.81 per share. After examination of the return, the Commissioner determined that the correct value was \$200 (Pet. App. A2). As the Court of Claims noted (Pet. App. A12), "the estate [sic] representatives acquiesced in [that value] and cannot but have had some input in establishing it, if only by claiming a still lower figure initially."

estate and its successors in interest. Treasury Regulations on Income Tax (1954 Code), Sections 1.1014-1(a), 1.1014-3(a) and (e), and 1.1014-4(a) (26 C.F.R.). Here, however, petitioners seek to disavow the values of the Nikoh stock used for estate tax purposes and claim that the fair market value of the Nikoh stock was significantly higher, so as to increase their bases in the stock and thereby eliminate the gain on the 1965 redemption.

The Court of Claims correctly rejected petitioners' attempt to whipsaw the government. A taxpayer is not "permitted to found any claim upon his own inequity or take advantage of his own wrong" (*Stearns Co. v. United States*, 291 U.S. 54, 62). See *Alamo Nat. Bank v. Commissioner*, 95 F. 2d 622, 623 (C.A. 5), certiorari denied, 304 U.S. 577; *Beltzer v. United States*, 495 F. 2d 211 (C.A. 8); *Building Syndicate Co. v. United States*, 292 F. 2d 623 (C.A. 9); *United States v. Hardy*, 299 F. 2d 600 (C.A. 4), certiorari denied, 370 U.S. 912. Compare *Stone v. White*, 301 U.S. 532.

As the Court of Claims observed (Pet. App. A12), petitioners, either actively or by acquiescence, presented to the Internal Revenue Service their position as to the values of the Nikoh stock at the pertinent dates for estate tax purposes. After the expiration of the statute of limitations on the estate tax liability, petitioners changed their position with respect to their 1965 income tax liability and contended that the original values had been erroneously understated. Under these circumstances, the Court of Claims properly held that petitioners are estopped from using a valuation for income tax purposes greater than the estate tax valuation. See *Beltzer v. United States*, *supra*, and cases cited therein.

Contrary to petitioners' contention (Pet. 12), the Court of Claims did not hold that the estate tax values conclusively established petitioners' bases under Section 1014(a).

The court recognized (Pet. App. A11) that the estate tax valuation is not always determinative of basis and that the facts of each case must be examined in order to determine whether a taxpayer should be barred from raising a particular claim when an inconsistent position has been previously taken. Compare *Ford v. United States*, 276 F. 2d 17 (Ct. Cl.), with *Erickson v. United States*, 309 F. 2d 760 (Ct. Cl.). Moreover, petitioners err in asserting (Pet. 11-20) that the Service's examination of the estate tax returns lifts the bar of estoppel. See *Beltzer v. United States*, 73-2 U.S.T.C., par. 9512, decided June 8, 1973 (D. Neb.), affirmed, 495 F. 2d 211 (C.A. 8). It is sufficient to establish reliance by the Internal Revenue Service by showing that the government did not collect a tax that would have been due had the disputed item been otherwise represented initially. *Bartel v. Commissioner*, 54 T.C. 25; *Akron Dry Goods Co. v. Commissioner*, 18 T.C. 1143, affirmed, 218 F. 2d 290 (C.A. 6). Compare *Stone v. White, supra*.

If petitioners at the time of the estate tax audit had made the representations they now advance, a larger estate tax would have been due. Petitioners are therefore estopped from making those claims to reduce their 1965 income tax liability.<sup>2</sup>

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<sup>2</sup>Petitioners also argue (Pet. 20-23) that the Court of Claims erred in allowing the government to amend its answer in order to raise the defense that the recovery was barred by equitable principles. Rule 39(a) of the Rules of the United States Court of Claims provides that a party may amend pleadings "by leave of court (which shall be freely given when justice so requires)." The decision whether to grant leave to amend the pleadings is within "the discretion of the trial judge." See *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330. Here, for the reasons explained in the text, the court acted well within its discretion in permitting the amendment.

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DANIEL M. FRIEDMAN,  
*Acting Solicitor General.*

MARCH 1977.